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Supreme Court of the United States

October Term 1946.

No. 503 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

Petition and Brief in Support of Writ of Certiorari to the Court of Appeals of the State of New York.

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.

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JOSEPH ESTIN, *Petitioner,* v. GERTRUDE ESTIN, *Respondent.*	No.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York, made April 18, 1947.

Opinions Below.

The opinion of the Special Term of the Supreme Court of the State of New York on granting the respondent judgment for arrears of alimony is published in 63 New York Supplement, 2d Series, 476, and appears at R. 126-141. The opinion of the Court of Appeals has not yet been reported in the official reports; a copy appears at R. 157. No opinion was written by the Appellate Division of the Supreme Court.

Jurisdiction.

The remittitur of the Court of Appeals is dated April 18, 1947 (R. A-1), and this petition is presented within three months from the date thereof. Jurisdiction is invoked under Section 237 (b) of the Judicial Code as amended February 13, 1925.

Questions Presented.

Do the provisions of Art. IV, Section 1, of the United States Constitution require that the State Courts of New York give the same effect to the valid divorce obtained by petitioner in Nevada upon due notice of process served personally on the respondent in New York, and not upon the service of process on the respondent within the jurisdiction of the Nevada Court, and without her personal appearance in that action, as would be given had the respondent been personally served within that jurisdiction or had appeared in that action?

Do the decisions of the State Courts of New York, made before the decision of this Court in *Williams* v. *North Carolina*, 317 U. S. 287, adjudging that the liability of a husband to pay alimony under a separation decree made in a New York Court terminates without qualification when a valid divorce is granted by a Court in any state, fix the New York law as to such liability in and require it to be applied to this case?

Statement.

On October 11, 1943, respondent, then the wife of petitioner, obtained a judgment of separation in the New York Supreme Court, Queens County, after personal service of process and his personal appearance in the action, on the ground of the wilful abandonment of the respondent by petitioner and which decree awarded respondent

$180.00 per month for her support and maintenance (R. 20).

In January, 1944, petitioner became and ever since has been and now is domiciled in Nevada (R. 62, 385).

On May 24th, 1945, the petitioner obtained a decree of divorce against the respondent in the Second Judicial District Court of the State of Nevada in and for the County of Washoe (R. 65), upon the ground of continual separation without co-habitation for three years (R. 66).

The respondent was served personally in New York State with the summons in said action and a certified copy of the complaint on April 20, 1945 (R. 60), but she failed to appear in said action and defaulted therein (R. 70).

In March, 1946, respondent moved at Special Term of the New York Supreme Court, Queens County, pursuant to Section 1171 B of the New York Civil Practice Act for a money judgment for the arrears of alimony required to be paid by the New York decree on the 5th day of June, 1945, and thereafter to and including February, 1946 (R. 14, 15). Petitioner opposed that motion and made a counter-motion under Section 1170 of the Civil Practice Act of New York to strike the alimony provisions from the alimony decree, relying upon his divorce decree obtained in Nevada evidenced by a duly exemplified copy of the record in that case (R. 67-81). Petitioner's motion was denied and respondent's motion was granted by the said Special Term (R. 126, 141), and an order and judgment was entered thereon July 9th, 1946 awarding the respondent $2,441.90 (R. 7, 11).

Upon appeal, the said judgment and order was unanimously affirmed by the Appellate Division of the Supreme Court, Second Judicial Department (R. 145), and judgment of affirmance was entered in the sum of $61.34 costs on November 20, 1946 (R. 147).

Upon appeal to the Court of Appeals, the said judgment was affirmed by its remittitur made the 18th day of

April, 1947, and the record remitted to the Supreme Court, Queens County, for enforcement (R. A-1).

Chief Judge Loughran wrote an opinion in the Court of Appeals, concurred in by the other Judges (R. 157), wherein it was held that the divorce decree granted the petitioner by the Nevada Court was valid, but further held that Article IV, Section 1, of the United States Constitution did not require that the New York Courts must hold that the petitioner's liability to pay alimony to the respondent pursuant to her New York separation decree ceased when the status of husband and wife ended. This was on the theory that the respondent, not having been served with process in the Nevada action within that state, nor having appeared therein, a personal right to continue to receive alimony under the New York separation decree survived the dissolution of the marriage of the Nevada Court (R. 161, 162).

Reasons for Granting the Writ.

1. The record presents a question of nation-wide importance; a question which seemed to have been answered by the decision of this Court in *Esenwein* v. *Commonwealth of Pennsylvania,* 325 U. S. 279, but which the Court of Appeals of the State of New York declined to follow, holding that the earlier decision of this Court made in *Barber* v. *Barber,* 21 Howard (62 U. S.) 582, was more applicable to the facts at bar. The opinion of the Court of Appeals quoted the only paragraph in the opinion in that case relating to the effect of a foreign divorce upon the alimony provisions of a New York separation decree, a statement made with no citation of authority to support it. The Court of Appeals cited no New York decision in support of or recognizing the authority of the *Barber* decision upon the law of New York.

2. The decisions in New York made prior to the decision in *Williams* v. *North Carolina*, 317 U. S. 287, held that a valid divorce decree ended the right of the woman to collect alimony from her former husband under a pre-existing separation decree and are of the same type as respects the manner in which the divorce was obtained as are the Pennsylvania cases cited by the majority opinion of this Court in *Esenwein* v. *Commonwealth of Pennsylvania* (*supra*) as fixing the law of that Commonwealth.

3. Does the old decision in *Barber* v. *Barber* (*supra*), made with no citation of authorities, or the recent decision in the *Esenwein* case, correctly state the effect of a divorce decree upon the alimony provisions of a pre-existing separation decree to be applied in this case?

4. The Common Law of New York is that an absolute divorce terminates the liability of a former husband for the support of his divorced wife. In such a case where the Court of Appeals of New York finds that a decree of absolute divorce was validly entered in Nevada in the husband's suit, is New York required under Article IV, Section 1, of the United States Constitution to give full faith and credit to the Nevada decree in applying the Common Law of New York?

5. The confusion which results from the decision of the Court of Appeals in preferring the decision of this Court in the *Barber* case to that of this Court in the *Esenwein* case can only be cleared up by this Court.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and that the Judgment below be reviewed.

Respectfully submitted,

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Petitioner and Respondent were legally divorced in Nevada. The Court of Appeals of the State of New York in its Opinion in this case so held (R. 159).

The Common Law of New York is that the duty of a husband to support his wife terminates when the relation of husband and wife ends.

Scheinwald v. *Scheinwald,* 231 App. Div. 757, 246 N. Y. S. 33;
Richards v. *Richards,* 87 Misc. Rep. 134, 149 N. Y. Sup. 1028;
Solotoff v. *Solotoff,* 51 N. Y. Sup. 2d 514 (not reported officially).

No Common Law power exists in the Courts of New York State to compel a man to support an ex-wife; such a right is based on statute alone.

Romaine v. *Chauncey,* 129 N. Y. 566 at 571;
Erkenbrach v. *Erkenbrach,* 96 N. Y. 456.

The only statutory provisions in New York for such support are §1155 of the Civil Practice Act when a divorce is granted a wife, and §7.5 of the Domestic Relations Law when a husband seeks a divorce based on the incurable insanity of his wife.

The respondent has no vested right under New York law to the alimony awarded by her separation decree, either as to past due or future installments.

The citation of *Livingston* v. *Livingston,* 173 N. Y. 377, by the Court of Appeals in its Opinion to the contrary was clearly a mistake.

When the decree of absolute divorce in that case was made in 1892, no court had any power to modify the ali-

mony provisions thereof. In 1900, the Code of Civil Procedure was amended to permit a court to amend such provisions whether the judgment was "heretofore or hereafter rendered". Hence the Court of Appeals held the wife's right under the decree in that action made in 1892 was a vested one.

When the decree in the instant case was granted, Section 1170 of the Civil Practice Act gave power to the court to modify alimony provisions of a judgment as to both past due and future installments, and this provision has been declared valid by the Court of Appeals.

Karlin v. *Karlin,* 280 N. Y. 32, 36;
Fox v. *Fox,* 263 N. Y. 68, 70.

Livingston v. *Livingston,* was cited in the *Karlin* case (p. 36) as being not in point, having concern with a judgment entered before the above amendment.

See:

Sistare v. *Sistare,* 218 U. S. 1.

The Common Law of New York is the same as the Law in Pennsylvania, in that the alimony or support provisions of a separation or support decree do not survive a subsequent valid divorce and the decision in Esenwein v. *Pennsylvania,* 325 U. S. 279, is in point.

The Pennsylvania cases cited by this Court in *Esenwein* v. *Commonwealth of Pennsylvania,* to wit, *Commonwealth* v. *Parker,* 59 Pa. Superior Ct. 74, and *Commonwealth* v. *Kurniker,* 96 Pa. Superior Ct. 553, consider divorces based on similar facts as to service of process on and appearance by the defendants as those of New York State cited in the Opinion of the Court of Appeals in attempting to differentiate this case from the *Esenwein* case.

The Nevada Courts have applied the same rule as was recognized by the prevailing opinion of this Court in Esenwein v. *Commonwealth of Pennsylvania.*

Herrick v. *Herrick,* 55 Nev. 59, 68.

It is the law in New York that the support or alimony provisions of a separation decree are merely incidental thereto. Unless a separation decree is granted the wife, no alimony may be awarded her.

Johnson v. *Johnson*, 206 N. Y. 561;
Ainsworth v. *Ainsworth*, 239 App. Div. 258.

In New York, alimony is not a debt due a wife but a general duty of support made specific and measured by the Court arising out of the marriage relationship and ends when that relationship ends.

Faversham v. *Faversham*, 161 N. Y. App. Div. 521;
Romaine v. *Chauncey*, 129 N. Y. 566;
Wetmore v. *Markoe*, 196 U. S. 68.

Under the cases cited, it follows that if the judgment of separation necessary to sustain the support provisions of the judgment is superseded by a decree dissolving the marriage, the prior alimony or support provisions thereof are also superseded by that decree, as they end with the separation judgment to which they are ancillary and without which they have no validity.

In Conclusion.

The Courts of the State of New York have failed to give to the divorce decree obtained by Petitioner in Nevada the full faith and credit required by Art. IV, Sec. 1, of the United States Constitution, and the Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE S. WING,
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Attorneys for Petitioner.